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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

Nos. 677 and 678

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ AND ABRAHAM M. SENDEROWITZ, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS ROYAL MANUFACTURING CO.,

Petitioners,

vs.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JULIUS M. RAPOPORT,
Counsel for Petitioners.

INDEX

Subject Index

	Page
Petition for writs of certiorari	1
Opinions below	2
Basis for jurisdiction	2
Questions presented	2
Statute involved	4
Summary statement of matter involved	4
Errors to be urged	13
Reasons relied on for the allowance of the writ	14
Conclusion	16
Brief in support of petition	17

Table of Cases Cited

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 Sup. Ct. 1215	18
Ambrosia Brewing Co. v. *Bowles*, 147 F. (2d) 550	16
American Bonding & Trust Co. v. *Gibson County*, 145 Fed. 871	15, 16
Arizona Grocery, 274 U. S. 370, 52 Sup. Ct. 183	17
Bowles v. *Lake Lucerne Plaza, Inc.*, 148 F. (2d) 967	16
Chapman v. *Griffith Consumers Co.*, 107 F. (2d) 263	20
City of Trinidad v. *Hokasona*, 178 Fed. 438	16
County Court of Marion County v. *United States*, 53 Ct. Cls. 120	16
Eveland v. *Detroit Machine Tool Co.*, 18 F. (2d) 968	16
Forbes Pioneer Boat Line v. *Board of Commissioners*, 258 U. S. 338, 42 Sup. Ct. 325	17
Helvering v. *Reynolds*, 306 U. S. 110, 59 Sup. Ct. 423	17
Kostovich v. *United States*, 99 F. (2d) 661	16
Morgan v. *United States*, 304 U. S. 1	18
Ochoa v. *Ferendez y Morales*, 230 U. S. 139, 33 Sup. Ct. 1033	17

	Original	Print
Oklahoma Operating Co. v. *Love*, 252 U. S. 331, 40 Sup. Ct. 338		19
Porter v. *Block*, 156 F. (2d) 264		15, 20
Porter v. *Sherwood Distilling Co.*, 156 F. (2d) 264		15
St. Louis, Iron Mountain & Southern Ry. Co. v. *Wynne*, 224 U. S. 354, 32 Sup. Ct. 493		19
Social Security Board v. *Nierkotko*, 66 Sup. Ct. 637		17
Texas Portland Cement Co., U. S. ex rel. v. *McCord*, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893		15
Wadley Southern R. R. Co. v. *Georgia*, 235 U. S. 651, 35 Sup. Ct. 214		18
Yakus v. *United States*, 321 U. S. 414		18
Young, Ex parte, 209 U. S. 123, 28 Sup. Ct. 441		19

STATUTES CITED

Emergency Price Control Act of 1942 as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. A. App. Sections 901 et seq.)	3
Judicial Code, sec. 240(a), 28 U. S. C. A. 347	2

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Petitioners,

vs.

PAUL A. PORTER, ADMINISTRATOR OF THE OFFICE OF PRICE ADMINISTRATION,

Respondent

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Morris H. Senderowitz, Morris Senderowitz and Abraham M. Senderowitz, individually and as co-partners trading as Royal Manufacturing Co., respectfully pray that writs of certiorari issue to review the Judgments of the United States Circuit Court of Appeals for the Third Circuit entered on August 19, 1946 (R. 43-44), reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania (R. 23), which

dismissed respondent's claim for treble damages regarding sales made by petitioners of Style Nos. 467,259 and 259(b).

Petitioners also respectfully pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit entered on August 19, 1946 (R. 43-44), affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania against the petitioners for $1,257.15 and entering an injunction against the petitioners (R. 23).

Petitioners respectfully request that this Court review the decision below.

Opinions Below

The opinion in the District Court is reported in 65 F. Supp. 548 and appears at R. 7. The opinion of the Circuit Court of Appeals for the Third Circuit has not yet been reported and will be found at page 30 of the Record.

Basis for Jurisdiction

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A., Sec. 347.

Questions Presented

1. Whether the Administrator has the power, ten months after an action for penal damages had been commenced, to issue an order retroactively and for the first time fixing maximum prices for commodities sold by petitioners, and under such circumstances may he recover damages in such action?

2. Where no maximum price had been fixed by the Administrator for a commodity sold by petitioners, is the Adminis-

trator's complaint demanding treble damages, served ten months before the price is fixed, fatally defective for failure to state a cause of action for overcharges on that commodity?

3. Whether Section 925(e) of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 308, 50 U. S. C. A., Appendix, Sections 901 *et seq.*) which authorizes the Administrator to sue for treble damages persons selling commodities who violate a regulation prescribing a maximum price, if construed as was done by the Court below, to permit treble damages for alleged overcharges in the sale of a commodity which antedated by more than one year the fixing of the maximum price therefor, is not unconstitutional.

4. Whether Section 924 of the Emergency Price Control Act, divesting all courts except the Emergency Court of Appeals of jurisdiction to consider the validity of any regulation or order issued by the Administrator is not unconstitutional in that it deprives petitioners of their property without due process of law where it is applied in the circumstances of this case, where the order under which suit is based is issued more than a year after the sales were made and petitioners were foreclosed from attacking the validity of the order in any forum.

5. Where respondent's proof consisted of:

a) Sales by petitioners at certain prices, and

b) A copy of the Administrator's Order retroactively fixing prices below the sales prices, and issued ten months after the action was commenced,

may the Court make a finding that petitioners are wilful violators of that Order?

6. Where the Administrator's Order establishes maximum selling prices for sales to wholesalers and retailers,

should the judgment in favor of the Administrator stand, whereas here the proof merely shows that the petitioners made sales to certain named individuals and there is no proof that they are either wholesalers or retailers?

7. Where the complaint alleges that none of the sales or deliveries "was made to persons purchasing such commodities for use or consumption other than in the course of trade or business" and petitioner's answer specifically denies such allegation, may the respondent recover where no proof was offered in support of such allegation?

Statute Involved

The statute involved is the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. A., Appendix, Sections 901 *et seq.*).

Summary Statement of Matter Involved

This is a penal action arising under the Emergency Price Control Act. Respondent, hereinafter referred to as "the Administrator", is the Administrator of the Office of Price Administration. Petitioners, hereinafter referred to as "Royal", are manufacturers of men's underwear and shorts, whose annual business amounted to some $6,000,000 per year. In July, 1944, the Administrator commenced a treble damage and injunction action in the United States District Court for the Eastern District of Pennsylvania against Royal alleging damages in a sum in excess of $300,000.

The District Court awarded damages and entered judgment in the sum of $1,257.15, dismissing the balance of the claim. Both the Administrator and Royal appealed to the United States Circuit Court for the Third Circuit.

The judgment of the District Court against Royal in the sum of $1,257.15 was affirmed. The judgment of the District

Court as to the balance of the Administrator's claim was reversed by the Circuit Court of Appeals for the Third Circuit, Circuit Judges Maris, Goodrich and McLaughlin sitting, opinion by Judge Goodrich, August 19, 1946, and the cause remanded for further proceedings not inconsistent with the opinion.

The proceedings were commenced by the service of the Administrator's complaint, dated July 14, 1944, which alleged overceiling sales by Royal in violation of the General Maximum Price Regulation issued by the Administrator covering a period of one year prior to that date (July 15, 1943 to July 14, 1944).

The complaint alleged (Paragraph 6) that Royal sold and delivered garments in the course of trade or business at prices in excess of the maximum prices established therefor pursuant to the provisions of the General Maximum Price Regulation.

The complaint further alleged (Paragraph 7) that none of the sales or deliveries alleged in the complaint "was made to persons purchasing such garments for use or consumption other than in the course of trade or business".

Royal, in its answer, *inter alia,* denied the allegations of Paragraphs 6 and 7. In addition, Royal alleged as and for a separate answer and defense that if it committed any of the violations in the complaint said violations were neither wilful nor the result of failure on Royal's part to take practicable precautions against their occurrence.

No reply was served or filed by the Administrator to Royal's answer; no amended or supplemental pleading was served or filed except that Royal, on October 15, 1945, filed an amended answer. No motion was made at any time by the Administrator to conform the pleadings to the proof.

Petitioners are manufacturers of men's underwear and shorts in Allentown, Pennsylvania. All commodities sold

by them are governed by the General Maximum Price Regulation. Prior to the commencement of this action in July of 1944, they had not been charged with violation of any regulations issued by the Administrator. In June, 1944, the Administrator commenced an exhaustive investigation of Royal lasting approximately six months (S. M. P. 169). Prior to June, 1944, the Administrator had conducted at least two investigations of Royal's business (S. M. P. 171). No prior action was ever commenced against Royal by the Administrator.

In June, 1944, the Administrator's witness, Goldstein, an investigator attached to the Apparel Unit of the New York City office, was assigned to investigate Royal's business located in Allentown, Pennsylvania. He had men assigned to assist him at various stages of the investigation and, in addition, a cost accountant was assigned to the case (S. M. P. 169).

Despite this exhaustive and lengthy investigation of a firm of this size, the Administrator solely attempted to prove at the trial that his investigators found that Royal had overcharged on nine sales to one purchaser 15¢ per dozen, on one sale 12½¢ per dozen, on two sales 7¼¢ per dozen, and on one sale 2 4/5¢ per dozen (Plaintiff's Exhibit 12; S. M. P. 135). These alleged violations of General Maximum Price Regulation in one year amounted in toto to $419.05. It is apparent that these few overcharges—obviously clerical errors—in one year in a firm of this size conclusively prove Royal's complete compliance with the wartime anti-inflationary program. It would be amazing if any other firm of this size, selling so great a variety of style numbers—checked so completely—could show so few errors.

These were the sole overcharges offered by the Administrator to prove violations of the General Maximum Price Regulation.

The great bulk of the alleged overcharges ($49,192.34) which the Administrator attempted to prove were violations of a letter order issued by the Regional Administrator of the Office of Price Administration, dated May 8, 1945 (Plaintiff's Exhibit 6B; Plaintiff's Appendix, C. P. 5a), ten months after the commencement of this action, which retroactively fixed prices established by another order of the Administrator, dated October 20, 1944 (Plaintiff's Exhibit 6A; Plaintiff's Appendix B. P. 3a), three months after the action was commenced.

It was for a violation of this order—an order issued long after the sales were made—that the Administrator sought treble damages in this penal action.

All commodities manufactured by Royal up to and including the period covered by this complaint were governed by the General Maximum Price Regulation issued by the Administrator. This regulation does not set specific dollar-and-cents maximum prices for all sellers selling the same commodities. It is rather a freeze regulation, restricting each seller to the highest prices of commodities sold by him in March of 1942. Realizing, however, that sellers, particularly manufacturers, constantly make new and different commodities, the Administrator provided for the pricing of commodities which he termed "similar" and "comparable", not sold during the base period.

Section 1499.2 of the General Maximum Price Regulation provides, in its applicable provisions, as follows:

> "Except as otherwise provided in this regulation, the sellers maximum price for any commodity or service shall be (a) the highest price charged by the seller during March 1942 (1) For the same commodity or service, or (2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it."

Between May 23, 1943 and June 1, 1944, the section of the General Maximum Price Regulation that pertains to the pricing of comparable commodities provided as follows:

"Section 3 (Section 1499.3). *Maximum prices for commodities and services which cannot be priced under Section 1499.2.* The seller's maximum price for a commodity or service which cannot be priced under Section 1499.2 of this General Maximum Price Regulation *shall be a maximum price in line* with the level of maximum prices established by this General Maximum Price Regulation. *Such price shall be determined by the seller in accordance with the following procedures:*

• • • • • • •

(b) In the case of a sale, other than at wholesale or retail, of a commodity for which a maximum price or pricing method has not been or is not specifically authorized by the Office of Price Administration, (1) The seller (i) shall select a comparable commodity for which a maximum price has been established under Section 1499.2(a) (1) of this regulation; (ii) shall divide his maximum price for the comparable commodity by its current direct cost; and (iii) multiply the percentage so obtained by the current direct cost of the commodity being priced. All customary discounts, trade practices, and practices relating to the payment of transportation charges in effect with respect to the sale of the comparable commodity shall apply to such maximum price.

'Comparable commodity' as used in this subparagraph (1) means a commodity which is made by the same seller, has the same general use and is recognized in the trade or industry as being of the same general type, even though different materials or construction are used, and has a current direct cost varying by not more than fifty per cent from the current direct cost of the commodity being priced. If more than one commodity can be regarded as comparable, the one whose current direct cost is closest to the current direct

cost of the commodity being priced shall be regarded as the 'comparable commodity.'

'Direct cost' means the sum of direct labor and direct material costs. Direct labor costs shall in no event be computed on wage rates higher than those permitted by law, and direct material costs shall in no event be computed on prices higher than the maximum prices established by the applicable maximum price regulations.

Within ten days after determining a maximum price under this subparagraph (1), the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out, copied from the form contained in Appendix C of this regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration."

During the base period (March 1942) Royal manufactured, among many others, two types of men's shorts, Style No. 469 at a base period price of $3.50 per dozen, the other Style No. 359 at a base period price of $2.87½ per dozen (Plaintiff's Exhibit 10; S. M. P. 119, 121).

These style numbers were constructed of a 60 by 48 or 64 by 60 thread count print cloth, two-button adjustable front (Style No. 469 used ten yards of cloth to the dozen and style No. 359 used nine yards of cloth to the dozen; Plaintiff's Exhibit 10, supra).

Subsequent to the base period, Royal commenced manufacturing two other items (Style Nos. 467 and 259) which were exactly similar to Style Nos. 469 and 359 in every respect except that the new style numbers were made from a print cloth of 44 by 36 construction. (The construction refers to the thread count per square inch of cloth.) In every other respect, including trimmings, buttons, labor, cost and appearance, all four shorts were exactly the same. Royal also commenced manufacturing a Style No. 259(b)

of the same cloth but using eight yards to the dozen (S. M. P. 33, 34).[1]

Thus, Royal's highest ceiling prices charged were:

Style No. 469—$3.50	Style No. 467—$3.15
Style No. 359—$2.87½	Style No. 259—$2.50

These were Royal's proper maximum prices in accordance with the General Maximum Price Regulation at that time. During all the times of Royal's sales there were no other prices for these style numbers. There was therefore no sale by Royal at any time in violation of any maximum price.

While the June 1944 investigation was proceeding (actually soon after its inception), prior to any determination by the Administrator of a price, and without the issuance of any order fixing the price, this action ensued.

On October 20, 1944, three months after this action was commenced, the Administrator issued an order under Section 1499.3(e) (1) of the General Maximum Price Regulation (Plaintiff's Exhibit 6A) entitled "Order No. 112 under Section 1499.3(e) (1) of the General Maximum Price Regulation." *Section 3 (e) (1) became effective and was added to the Regulation on June 1, 1944. (The last sale of Items 259 or 467 proven at the trial occurred on April 13, 1944; S. M. P. 55).* This order was directed to Royal and informed it that the Administrator fixed the price on Style No. 467 (ten yards to the dozen) at $1.60 per dozen, and on Style No. 259 (nine yards to the dozen) at $1.50 per dozen. No price was fixed on Style No. 259(b) (eight yards to the dozen).

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[1] Petitioners are contending in their protest filed with the Administrator that Style Nos. 259, 467 and 259(b) are "similar" in accordance with Section 1499.2 of the General Maximum Price Regulation to Style Nos. 469 and 359. However, because the cost of the raw materials of the new style numbers to petitioners were cheaper than the old, petitioners, in computing the maximum price, passed on this saving to their purchasers and arrived at a price below that as calculated by Section 1499.3(b).

From a reading of the Order it is readily apparent that neither the claimed costs of Royal nor their mathematical computation of their maximum prices were controverted by the Administrator. The sole reason for the confiscatory order price was "the maximum price reported by you is not in line with the level of maximum prices established under the General Maximum Price Regulation".

Thus, whereas, under Royal's correctly computed price it sold Style No. 467 for a maximum of $3.15 per dozen, the Administrator ordered a price of $1.60 per dozen, and whereas Royal sold Style No. 259 at a maximum of $2.50 per dozen, the Administrator ordered a price of $1.50 per dozen.

There was no language in this Order from which even an inference could be drawn that there was any attempt to make these prices retroactive. The Order speaks in futuro only and says:

(Plaintiff's Appendix, P. 4a):

"1. Your maximum selling price to wholesalers and retailers *shall* be established as follows:

Description	*Style No.*	*Authorized Maximum Price*
Men's shorts made of 44 x 36 cotton printed cloth, 10 yards to the dozen, two buttons	467	$1.60 per dozen Terms: 1% 10 days; Net 30 days
Men's shorts made of 44 x 36 cotton printed cloth, 9 yards to the dozen, two buttons	259	$1.50 per dozen Terms: 1% 10 days; Net 30 days"

It was not until May 8, 1945, ten months after the commencement of this action and seven months after the issuance of Order No. 112, that the Administrator for the first time attempted to make the prices fixed in Order No. 112 retroactive. (Plaintiff's Exhibit 6B; Plaintiff's Appendix 5a.)

Assuming the validity of these orders, it is apparent that

if the Administrator had any cause of action it arose ten months after this action was commenced. If this action had come on for trial prior to May 8, 1945, the Administrator would necessarily have been non-suited.

At the trial, the Administrator, in attempting to prove his case against Royal, divided his proof into two parts.

Part 1, proof of thirteen sales in one year of Styles 1810, 1850, 461, 489 and 459(b) resulting in overcharges amounting to $419.05, and

Part 2, proof of sales between July 15, 1943 and April 13, 1944; 3,579½ dozen men's shorts Style No. 467 at $2.90 per dozen, 1,948 dozen of the same style at $3.00 per dozen, and 3,417 dozen of the same style at $3.15 per dozen; 750 dozen men's shorts Style No. 259 at $2.37½ per dozen, and 29,240½ dozen of the same style at $2.50 per dozen; 6,478½ dozen boys' shorts Style No. 259(b) at $2.37½ per dozen, and 950 dozen of the same style at $2.50 per dozen.

To prove all these sales, the Administrator offered in evidence a transcript of Royal's sales invoices which showed the prices at which Royal sold these items. (Plaintiff's Exhibit 3; S. M. P. 55.)

To prove the maximum prices of these items, the Administrator, as to Part 1, offered in evidence Royal's base period statement which reflected these prices. (Plaintiff's Exhibit 1; S. M. P. 11.)

To prove the maximum prices of the balance of the items the Administrator, as to Part 2, offered in evidence Order No. 112 under Section 3(e)(1) of the General Maximum Price Regulation *(P. 3a, Plaintiff's Appendix, and Amendment No. 1 thereto; P. 5a, Plaintiff's Appendix)* issued by the Administrator some ten months after this action was commenced. This was the sole proof offered by the Administrator. After the Administrator had rested, Royal moved to dismiss. The Trial Court reserved decision. Royal then

rested. The Trial Court, in its decision, ruled that Royal, as to Part 1, had sold these commodities at prices in excess of the maximum prices. The Trial Court permitted no recovery as to any other item.

The Circuit Court of Appeals ruled that the Trial Court had erred in refusing to allow recovery as to Part 2 of the proof and remanded the cause for further proceedings not inconsistent with its ruling. The Circuit Court further affirmed the judgment against Royal in the sum of $1,257.15.

Errors to Be Urged

The Court below erred:

1. In reversing the judgment of the District Court that the Administrator's complaint did not state a cause of action when filed.

2. In failing to hold that the Administrator's right to recover in this action must be predicated upon facts in existence at the time the complaint was filed.

3. In affirming the judgment of the District Court against Royal in the sum of $1,257.14.

4. In holding that the District Court's judgment that the complaint failed to state a cause of action was in effect a determination that Order No. 112 and Amendment No. 1 thereto were invalid.

5. In failing to hold that Section 925(e) of the Emergency Price Control Act does not authorize the Administrator's treble damage action in a situation such as this where no maximum price has been fixed for a commodity prior to the sale thereof; that if Section 925(e) is so construed as to permit such a penal recovery, the section is unconstitutional and void.

6. In holding that the recovery of treble damages in a penal action for a violation of a regulation when the amount

of damages is to be measured by a maximum price which was not in existence at the time the violation occurred is not in violation of the *ex post facto* provisions of the Constitution.

7. In holding that the *ex post facto* provisions of the Constitution do not apply to this penal action.

8. In failing to hold that the Emergency Price Control Act of 1942, as amended, is unconstitutional and void because it deprives Royal of its property without due process of law, when as in this case it is so construed as to permit the award of penal damages to the Administrator in a situation where, as appears in this record, Royal had no opportunity to challenge in Administrative proceedings an Order issued ten months after the Administrator commenced his suit for penal damages and was barred by the District Court from attacking the validity of the Order at the trial.

Reasons Relied On for the Allowance of the Writ

1. The issues presented in this record and the decision of the Court below, if permitted to stand, opens the door to the general expansion of the novel and unauthorized practice of retroactive administrative determination of private rights. The application of the Emergency Price Control Act by the Administrator to the facts of this case constitute an ingenious and unconstitutional development and expansion of the powers invested in the Administrator by Congress. If permitted to stand, the judgment below may provide a stimulus for application by the Administrator of the same unconstitutional processes to entirely novel situations; since, moreover, the Emergency Price Control Act is applicable to and affects all sections of American industry and manufacture, and since, if the Administrator's conduct in this case and the sanction accorded to it by the Court be-

low are projected into the future, permitting the judgment below to stand, will legalize a widespread administrative encroachment which does violence to the traditional concepts of fair play and to the Constitutional guarantee against deprivation of one's property without due process of law.

2. The decision below is in direct conflict with the decisions of the United States Circuit Court of Appeals for the Fourth Circuit in the cases of *Paul A. Porter, Price Administrator* v. *The Sherwood Distilling Company* and *Paul A. Porter, Price Administrator* v. *Block,* decided May 23, 1946, 156 Fed. Reporter, 2d Series, 264, rehearing denied July 13, 1946. In those cases, the Administrator sought mandatory injunctions requiring the defendants to file applications for maximum prices on certain products sold in 1943, before maximum prices therefor had been established. The Administrator also sought recovery of $296,564.82, or three times the amount by which the aggregate sales prices of the goods sold exceeded the maximum prices which the Administrator alleged he would have approved if the application had been filed and the prices had been established before the sales were made. The action was brought after the defendants had discontinued the sales of the commodities. The Circuit Court of Appeals for the Fourth Circuit affirmed the dismissal of the complaint by the District Court on the ground that the complaint did not state a cause of action. The situation in these cases decided by the Fourth Circuit is identical with the matter here involved. The decisions by the Fourth Circuit are in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit, the review of which is here prayed.

3. The decision below is in direct conflict with the decision in *United States ex rel. Texas Portland Cement Co.* v. *McCord,* 233 U. S. 157, 164, 34 S. Ct. 550, 58 L. Ed. 893; *American Bonding & Trust Co.* v. *Gibson County,* 6 Cir.,

145 F. 871, 874, 7 Ann. Cas. 522; and *Eveland* v. *Detroit Machine Tool Co.*, D. C. E. D. of Michigan, 18 F. 2d 968, 969; *County Court of Marion County, West Virginia* v. *United States*, 53 Ct. Cls. 120; *Kostovich* v. *United States*, 6th Cir., 99 Fed. (2d) 661; *City of Trinidad* v. *Hokasona*, 8th Cir., 178 Fed. 438.

4. The decision below is also in conflict with the decision in *Bowles* v. *Lake Lucerne Plaza, Inc.*, C. C. A. 5th Circuit, 148 F. 2d 967 and *Ambrosia Brewing Co.* v. *Bowles*, decided by the Emergency Court of Appeals, 147 F. 2d 550. These conflicting decisions involve important questions of national scope relating to the administration of Federal statutes and particularly with the right of the Price Administrator to make orders which are in effect legislative and which are in violation of the Constitution of the United States and with the right of the Administrator to make such rules and regulations retroactive, in violation of the Constitution of the United States.

5. The obvious conflict and the importance of the questions involved demonstrate the necessity for review by this Court of the decision below.

Conclusion

It is respectfully submitted that writs of certiorari should issue from this Court to review the judgments of the United States Court of Appeals for the Third Circuit.

JULIUS M. RAPOPORT,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION

ARGUMENT

Section 925(e) of the Emergency Price Control Act of 1942, as Amended, Empowering the Administrator to Collect Treble Damages for the Violation of a Price Fixing Regulation, as Applied to the Facts of this Case, Is Unconstitutional in That It Deprives Your Petitioners of Their Property Without Due Process of Law.

A. *The retroactive application by the Administrator of the Maximum Price Regulation to the sales of commodities involved in this case was unreasonable and constituted an infringement of the rights guaranteed to the petitioners by the Fifth Amendment of the United States Constitution.*

It is a well settled principle, reaffirming many times in important precedents by the Supreme Court, that retroactivity is not favored by the "law". *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338, 42 S. Ct. 325; *Ochoa* v. *Ferendez y Morales,* 230 U. S. 139, 33 S. Ct. 1033. Equally well settled is the rule that if the legislation under which the Administrator acts does not explicitly grant him the power to apply an order retroactively, such power cannot be implied. *Helvering* v. *Reynolds,* 306 U. S. 110, 59 S. Ct. 423; *Arizona Grocery,* 274 U. S. 370, 52 S. Ct. 183.

A reading of the Emergency Price Control Act fails to disclose Congressional intention to grant the power to the Price Administrator to make retroactive orders; it cannot be questioned that the source of the power must derive from Congress; *Social Security Board* v. *Nierkotko,* 66 S. Ct. 637.

Furthermore, the Administrator, conceding that there is no authority in the Act to the effect that he could fix

prices and give them a retroactive effect, stated, in the Statement of Considerations to Amendment No. 54 to the General Maximum Price Regulation, issued May 24, 1943, effective May 29, 1943, 8 F. R. 6962:

> "Adjustments in reported prices may be made by the Office of Price Administration but they will not apply retroactively."

In *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 64 S. Ct. 1215, a divided Court faced with an order issued by the Wage and Hour Administrator which was in direct conflict with the statute directed him to issue an order in conformity with the statute. Unless such order was issued the statute would be ineffective. In that case the Court was at least equally divided as to whether the Administrator should be directed to issue a corrective order.

B. *Enforcement of the sanction of treble damages by the Administrator in advance of a hearing before the Emergency Court of Appeals deprives your petitioners of their property without due process of law; and the application of the Administrator of such sanctions was an abuse of the permissive discretion prescribed by this Court for the governance of administrators in like situations; Morgan et al.* v. *United States,* 304 U. S. 1; *Wadley Southern Railroad Co.* v. *Georgia,* 235 U. S. 651, 35 S. Ct. 214.

The facts of the instant case are almost tailored to fit the general character of the hypothetical projection of administrative abuse envisaged by this Court in *Yakus* v. *United States,* 321 U. S. 414.

C. *Section 925(e) of the Emergency Price Control Act of 1942 authorizes a treble damage action only if the seller has violated a regulation prescribing a maximum price.*

Concededly, there was no price fixed when the goods were sold nor was one fixed when the action was commenced. If such section is so construed as to permit a treble damage action under these facts such penal action constitutes a deprivation of the petitioners' property without due process of law in violation of the Fifth Amendment of the Constitution. *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441; *St. Louis, Iron Mountain & Southern Railway Co.* v. *Wynne*, 224 U. S. 354, 32 S. Ct. 493; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 40 S. Ct. 338.

D. *The Court below erred in holding that the Administrator's complaint stated a cause of action and that its sufficiency was not dependent upon facts in existence at the time the complaint was filed.*

This ruling is in direct conflict with the rule long established by this Court that the plaintiff's right to recover must depend upon its right at the inception of the action, and the non-existence of a cause of action when the suit was started is a fatal defect which cannot be cured by the accrual of a cause pending suit. (Cf. p. —, *supra.*) This view was sustained by the District Court in its learned opinion (R. 7).

Furthermore, under Section 925(e) of the Emergency Price Control Act this action by the Administrator is purely statutory and must be brought within one year from the date of the occurrence of the violation. The last sale occurred on April 13, 1944. The order of the Administrator upon which any possible cause of action must be based was issued on May 8, 1945, more than one year after the last sale occurred. Thus, in any event, the action is barred

by the statute of limitations. This very question was emphasized by the Court in *Chapman* v. *Griffith Consumers Co.*, 107 F. (2d) 263, by the United States Court of Appeals, District of Columbia.

The ruling of the Court below is also in direct conflict with the case of *Porter, Price Administrator* v. *The Sherwood Distilling Company*, 156 F. (2d) 264, where the Circuit Court of Appeals for the Fourth Circuit dismissed the Administrator's complaint in a situation similar to the case at bar.

Conclusion

This case presents signally important Constitutional issues which germinate out of the vital, and under present governmental processes overspreading, relationships between the Administrative Agent, the private citizen, the Congress and the Constitution.

The searching and fundamental question is presented whether a citizen conducting a lawful business may be required by the Administrator, with the aid of the Congress, to surrender, without first having been accorded a fair hearing in conformity with Constitutional guarantees, his property to the end that the Emergency Price Control Act may be enforced in a manner selected, and at a time chosen, by the Administrator in his sole discretion, and in the exercise of a self-created power, nowhere to be derived from the constituting legislation.

The case presents the further question, important in a world where the pressure of autocratic power continuously erodes democratic processes, whether, when the Administrator reaches out to the limits he has in this case, a new power has not been brought into existence which breaks the structure of powers on which our government rests, and whether such a novel redistribution of powers,

colliding as they do with the Constitution, can be permitted to stand in practice without the people's consent.

Though narrower in compass, the following issues are of equal importance to those above stated, since they are encased within them:

Does the Emergency Price Control Act explicity grant to the Administrator the right to make a retroactive price fixing regulation?

Does it do so by fair implication?

Can the Administrator, in advance of a determination by the Emergency Court of Appeals as to the validity of this retroactive regulation, collect treble damages for the alleged violation thereof?

Finally, we underline the special impact on the petitioners of the fact that unless this Court intervenes, they will have no way by which to prevent or restrain the unconstitutional consequences which must flow from the enforcement of the decree below.

Respectfully submitted,

JULIUS M. RAPOPORT,
Council for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 677

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ and ABRAHAM M. SENDEROWITZ, individually and as co-partners trading as ROYAL MANUFACTURING COMPANY,

Petitioners,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator.

No. 678

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ and ABRAHAM M. SENDEROWITZ, individually and as co-partners trading as ROYAL MANUFACTURING COMPANY,

Petitioners,

vs.

PHILIP B. FLEMING, Temporary Controls Administrator.

REPLY BRIEF FOR PETITIONERS

JULIUS M. RAPOPORT,
Attorney for Petitioners.

INDEX

CITATIONS

PAGE

CASES:

Collins et al. v. Fleming (not yet reported) 1

Cummings v. Missouri, 4 Wall. 277 4

Ex Parte Garland, 4 Wall. 333 4

Martini v. Porter, 157 F. (2d) 35 2

Morgan et al. v. United States et al., 304 U. S. 1 4

Pierce v. Corskadon, 16 Wall. 234 4

Porter v. Kramer, 156 F. (2d) 687 2

Yakus v. United States, 321 U. S. at p. 434 3

STATUTES:

Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, Secs. 901 et seq.) 3

MISCELLANEOUS:

Black—Handbook of American Constitutional Law (1927), Section 266 4

Blackstone—Commentaries (Third Edition), 11 n. 4

Cooley—Constitutional Limitations (Seventh Edition, 1903), 375, 376 4

McAllister—Ex Post Facto Laws in the Supreme Court of the United States (1927), 15 Cal. Law Review, 269, 281-2 4

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REPLY BRIEF FOR PETITIONERS

I

Respondent, in substance, concurs in petitioners' request for a writ of certiorari.

The respondent, in his brief, cites *Collins et al.* v. *Fleming* (not yet reported) as being in conflict with the decision of the Third Circuit Court of Appeals in the instant case,

as well as with the decisions of the Eighth and Ninth Circuit Courts in *Martini* v. *Porter,* 157 F. (2d) 35, and *Porter* v. *Kramer,* 156 F. (2d) 687, and correctly concludes that "resolution of the conflict, therefore, is sufficiently important to warrant review of the question by this Court" (see p. 17 of respondent's Memorandum). Petitioners contend it would constitute only a partial presentation of the reasons for the granting of certiorari were we to omit the no less significant circumstance that, in view of the pending suit for treble damages, capable of continuation and enforcement by the Administrator, petitioners will, *unless this Court takes this case,* be deprived of their property without due process of law, in violation of their constitutional guarantees.

It should be noted that the need to resolve the demonstrated conflict in decision and to prevent an invasion of petitioners' constitutional rights is not diminished by any argument set out in the respondent's Memorandum. It is not the case, as the respondent argues (pp. 17 and 18 of his Memorandum), that this Court would be confined to a determination of whether or not the lower Court had jurisdiction to pass upon the validity of the questioned regulation. The issue is not a jurisdictional one. The fundamental question concerns the assumption and use by the Administrator of powers nowhere vested in him by the statute—either directly in so many words, or by necessary implication. The self-originated powers which the Administrator purports to exercise are: (1) The power to make a retroactive order long after the suit was instituted; and (2) The power to maintain the suit based upon the retroactive order to recover treble damages even before your petitioners were accorded the opportunity of testing the validity of the regulation in the Emergency Court of Appeals.

Moreover, the conduct of the Administrator in this case, the utilization by him of the lower Courts to collect treble damages for the assumed violation of a retroactive order, the validity of which has not yet been established, offers to your petitioners the uncomfortable assurance that the respondent will continue to pursue his course of abusive

discretion, already clearly demonstrated, unless this Court intervenes to put a stop to such action. Thus, there lies in the immediate offing the very real and contiguous probability that the Administrator will seek enforcement of the treble damage suit, irrespective of any determination by the Emergency Court of Appeals. We respectfully submit that due process of law, under our Constitution, requires this Court to intervene, where, as here, an Administrator seeks to compel a citizen, lawfully carrying on business in the United States, to face such coercive alternatives. Indeed, in so suggesting, we urge this Court to do no more than it has already forcefully indicated in the *Yakus* case, 321 U. S. at page 434, to wit, invoke and exercise its corrective authority where continued abuse of power by the Administrator trenches upon constitutional privilege. It is too early to forget that the pattern of due process afforded by the Emergency Price Control Act skirted upon the fringes of unconstitutionality; and this Court, to salvage that provision of the statute from such a taint, was at pains to point out that it would intervene to prevent such abuses of discretion, or unlawful arrogation of power. Mr. Chief Justice Stone, speaking for the majority, stated in that respect:

> "For the purpose of this case in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence, we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously, we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he

would deny due process to petitioners by 'loading the record against them' or denying such hearing as the Constitution prescribes."

We need not indulge in any assumption here that the Administrator *would* "fail in the performance of any duty imposed on him by the Constitution and the laws of the United States". Regrettably, he has already failed in that regard by fashioning for himself powers not granted to him by Congress.

It should be further noted that enforcement of the judgment below would constitute a final determination of the validity of the order by the Administrator through the instrumentality of the Courts, and would thus do violence to the rule of this Court in *Morgan, et al.* v. *United States, et al.,* 304 U. S. at page 1, which established that due process forbids any Administrator from making a final determination against a party without giving him a fair opportunity to be heard.

That the respondent's argument on the ex post facto issue (see pp. 10 and 11 of respondent's Memorandum) is without merit is plainly affirmed by the well-settled proscription, firmly established by leading authorities, against the deprivation of fundamental rights based upon conduct antedating the penalizing statute. (*Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277; *Pierce* v. *Corskadon,* 16 Wall. 234; *Cooley, Constitutional Limitations* (7th Ed., 1903), 375, 376; *Black, Handbook of American Constitutional Law* (1927), Section 266; *Blackstone, Commentaries* (3rd Ed.), 11 n.; *McAllister, Ex Post Facto Laws in the Supreme Court of the United States* (1927), 15 Cal. Law Review, 269, 281-2.)

In sum, the proceedings against these petitioners, viewed in their completeness, constitute a gross and cumulative abuse of due process.

Respectfully submitted,

JULIUS M. RAPOPORT,
Attorney for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute and regulation involved	3
Statement	3
Discussion	8
Conclusion	20
Appendix	22

CITATIONS

Cases:

Addison v. *Holly Hill Fruit Products Corp.*, 322 U. S. 607 — 11

Ambrosia Brewing Co. v. *Bowles*, 147 F. 2d 550 — 13

Bankers Trust Co. v. *Blodgett*, 260 U. S. 647 — 11

Bowles v. *Lake Lucerne Plaza*, 148 F. 2d 967, certiorari denied, 326 U. S. 726 — 13

Bowles v. *Seminole Rock and Sand Co.*, 325 U. S. 410 — 9

Bowles v. *United States*, 319 U. S, 33 — 6

Bowles v. *Willingham*, 321 U. S. 503 — 9

Calder v. *Bull*, 3 Dall. 386 — 11

Case v. Bowles, 327 U. S. 92 — 9

Charlotte Harbor Ry. v. *Welles*, 260 U. S. 8 — 11

Chase Securities Corp. v. *Donaldson*, 325 U. S. 304 — 11

Collins et al. v. *Fleming*, (not yet reported), No. 352, 353, and 357, Emergency Court of Appeals decided January 2, 1947 — 12, 13, 14, 16

Danforth v. *Groton Water Co.*, 178 Mass. 472 — 11

General American Tank Car Corp. v. *El Dorado Terminal Co.*, 308 U. S. 422 — 11

Goodyear Tire & Rubber Co. v. *Ray-O-Vac Co.*, 321 U. S. 275 — 20

Graham & Foster v. *Goodcell*, 282 U. S. 409 — 11

Jones v. United States, 137 U. S. 202 — 6

Martini v. *Porter*, 157 F. 2d 35 — 9, 12, 17

Milliken v. *United States*, 283 U. S. 15 — 12

Porter v. *Block*, 156 F. 2d 264 — 13

Porter v. *Eastern Sugar Associates*, decided January 6, 1947 (C. C. A. 4, not yet reported) — 9

Porter v. *Kramer*, 156 F. 2d 687 — 12, 17

Porter v. *Sherwood Distilling Co.*, 156 F. 2d 264 — 13

Rafferty v. *Smith, Bell & Co.*, 257 U. S. 226 — 11

Smith v. *Hoboken R. R., Warehouse and S. S. Connecting Co.*, No. 384, October 1945 Term — 11

Cases—Continued Page

Stearns Co. v. *United States*, 291 U. S. 54 12
Thompson v. *Texas Mexican Ry. Co.*, No. 42, October 1945 Term 11
United States v. *Commercial Credit Co.*, 286 U. S. 63 20
United States v. *Heinszen & Co.*, 206 U. S. 370 11
Welch v. *Henry*, 305 U. S. 134 11
Williams Manufacturing Co. v. *Shoe Machine Corp.*, 316 U. S. 364 20
Yakus v. *United States*, 321 U. S. 414 9

Statutes:

Emergency Price Control Act of 1942, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 50 U. S. C. App., Supp. V, Secs. 901 et seq.):
Section 2 (c) 22
Section 2 (g) 22
Section 4 (a) 22
Section 201 (d) 23
Section 204 (d) 8, 10, 23
Section 205 (e) 5, 10, 19, 23

Miscellaneous:

General Maximum Price Regulation:
Section 1499.1 (a) (7 F. R. 3153) 25
Section 1499.2 (7 F. R. 3153) 4
Section 1499.3 (7 F. R. 3153) 4, 6, 10
Section 1499.3 (b) (1), as amended by Amendment 54 (7 F. R. 3153, 8 F. R. 6962) 25
Section 1499.3 (b) (1), as amended by Amendment 61 (7 F. R. 3153, 9 F. R. 5169) 27
Section 1499.3 (c) (7 F. R. 7093) 14
Section 1499.3 (e) (1), as added by Amendment 61 (9 F. R. 5169) 6, 29
Order No. 112 issued under Section 1499.3 (e) (1) of the General Maximum Price Regulation 5, 6, 8, 10, 30
Amendment No. 1 to Order No. 112 issued under Section 1499.3 (e) (1) of the General Maximum Price Regulation .. 15, 32
Statement of Considerations accompanying Order No. 112 ..... 6, 33

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 677

MORRIS H. SENDEROWITZ, MORRIS SENDEROWITZ AND ABRAHAM M. SENDEROWITZ, INDIVIDUALLY AND AS CO-PARTNERS TRADING AS ROYAL MANUFACTURING COMPANY, PETITIONERS

v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

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v.

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court (R. 7a–22a) is reported in 65 F. Supp. 548. The opinion of

the circuit court of appeals (R. 30–42) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on August 19, 1946 (R. 43, 44). The petition for writs of certiorari was filed on November 8, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTIONS PRESENTED

Where certain sales of apparel were subject to a maximum price regulation which required the seller to submit tentative ceiling price computations for possible prospective revision by the Administrator to conform to the regulation's standards, and the seller failed to submit such computations within the time required and until after a statutory damage action had been filed by the Administrator; and after such submission, the Administrator issued an order definitely fixing the ceilings for these prior sales,

(1) whether the exclusive jurisdiction provisions of Section 204 (d) of the Emergency Price Control Act, as amended, required the courts below to assume the validity of the Administrator's order and apply it to the sales to which it was expressly made applicable;

(2) if Section 204 (d) be regarded as inapplicable,

(a) whether the doctrine invoked by the District Court, that "the rights of the parties must be determined on facts existing at the inception of the suit" has any relevance to this suit;

(b) whether the petitioner, who illegally withheld the report of his tentative ceiling price computations until after the damage action had been filed, has standing to assert and is correct in his position, that the Administrator is without power to establish prices applicable to the prior sales.

(3) whether this Court should reverse the findings of both the courts below that the sales in question were made to wholesalers or retailers for use in the course of trade or business, and that the overcharges were wilful or the result of failure to take practical precautions to prevent their occurrence.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended (hereinafter sometimes referred to as the Act) and of the General Maximum Price Regulation (hereinafter sometimes referred to as the GMPR) are set forth in the Appendix, *infra*, pp. 22–35.

STATEMENT

Petitioners in 1943 and 1944 manufactured and sold certain styles of men's underwear known as

"shorts." Some of these styles (Nos. 1810, 1850, 461, 469 and 459 (b)) had been sold during March, 1942; and under the provisions of Section 1499.2 of the GMPR, the prices charged at that time became the lawful ceiling prices. Undisputed evidence showed that the petitioners made certain sales of these styles at prices totaling $419.05 in excess of the ceilings (R. 21a). Other styles (Nos. 259, 259 (b), and 467), also sold by the petitioners in 1943 and 1944, had not been sold during the base period (R. 18a). They were made of cotton cloth with a construction of only 44 by 36 threads to the inch. Shorts of otherwise similar style, but made of 60 by 48 or 64 by 60 thread count, had been sold by the petitioners during the base period. Section 1499.3 of the GMPR, which was applicable where the same or similar commodities had not been sold during the base period, provided that the ceilings were to be maximum prices "in line with the level of maximum prices established by this General Maximum Price Regulation," and subsection (b) (1) of Section 1499.3 provided a method whereby the seller could compute tentative ceiling prices by means of a formula. The prices so computed were to be reported to the Price Administrator, and were "subject to adjustment at any time by the Office of Price Administration."

The petitioners made no such report within the required time (R. 19a). They made no effort to inform the Administrator about their marketing of

new styles, and afforded him no opportunity to adjust their prices to bring them into line. Between March, 1943, and April, 1944, they sold large quantities of style 467 at prices ranging from $2.90 to $3.15 per dozen, and styles 259 and 259 (b) at from $2.37½ to $2.50 per dozen (R. 18a).[1] The Administrator learned of these dealings at a time when the one-year statute of limitations provided in Section 205 (e) in the Act had already run as to some of these sales and was about to bar recovery based on additional ones. On July 14, 1944, the Administrator therefore commenced an action for injunctive relief and for treble damages, alleging sales exceeding the ceilings by $100,000 (R. 1a, 8a). On August 1, 1944, the petitioners finally filed with the OPA their reports of computations of ceiling prices for styles 467 and 259 under Section 1499.3 (b) (1) of the GMPR (R. 3a) (They apparently decided to treat style 259 (b) as the same item as style 259.) The reports computed the ceilings at $3.169 per dozen for style 467 and $2.839 per dozen for style 259.

On October 20, 1944, the OPA Regional Administrator issued Order No. 112 under Section 1499.3 (e) (1) of the GMPR, which revised the reported ceilings to $1.60 per dozen for style 467 and $1.50 per dozen for style 259 (R. 3a–4a).

[1] The reference to these prices as "Royal's highest ceiling prices" on page 10 of the petition, is misleading. These were petitioners' self-determined selling prices, not the legal maximum prices.

The Order set forth that no shorts similar to these styles had been sold by the defendants or any of their competitors during March, 1942, and that therefore Section 1499.3 of the GMPR became applicable, but that the reported prices were not in line with the level of maximum prices established by the GMPR. The Statement of Considerations, *infra*, pp. 33–35, to this order stated that in March, 1942, 44 by 36 cloth was used only for bookbindings and was considered impractical and unserviceable for use in men's undershorts; that business firms specializing in even the cheapest merchandise had never encountered shorts made of such material, and that even shorts made from 60 by 48 material had sold at only $1.80 per dozen.[2]

On May 8, 1945, this Order was amended to insert language expressly making it applicable to sales made before its issuance[3] (R. 5a).

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[2] Statements of Considerations are official office documents setting forth reasons for the establishment of maximum prices. The Statement involved here is not in the Record, but the courts are not barred from taking judicial notice thereof. *Bowles* v. *United States*, 319 U. S. 33; *Jones* v. *United States*, 137 U. S. 202.

[3] The original order purported to be issued under Section 1499.3 (e) (1) of the GMPR, which was in effect at the time of issuance and at the time the petitioners' prices were filed (having been added by Amendment 61, effective June 1, 1944, 9 F. R. 5169). Section 1499.3 (b) (1), which was in effect at the time of the sales also gave authority to adjust prices—though the authority to adjust retroactively was not set forth explicitly. The amended order, being of a *nunc pro tunc* character, is properly in terms of Section 3 (b) (1). The fact

At the trial, at the close of the Administrator's evidence, the petitioners rested and moved for dismissal (R. 8a). The district court found that the sales had been made in the course of trade or business to wholesalers or retailers (R. 21a). Judgment was entered for $1,257.15 (treble the amount of overcharges on the sales of styles Nos. 1810, 1850, 461, 469, and 459 (b)), and injunctive relief was also granted (R. 23a). In awarding full treble damages, the court found that the petitioners' sales at excessive prices "were either wilful or the result of defendants' failure to take practical precautions against the occurrence of such violations. Defendant's conduct was in complete disregard of the requirements of the General Maximum Price Regulations and the duties imposed upon them by law." (R. 21a). That portion of the Administrator's claim requesting damages for overceiling sales of styles 259, 259(b) and 467 was dismissed on the ground that the plaintiff did not have a cause of action at the

that Section 1499.3 (e) (1) merely restated the power previously existing under Section 3 (b) (1) was noted as follows by the court below (R. 41): "Ever since the origin of the regulations in 1942 the policy has been that of keeping individual maximum prices in line with the level of maximum prices established by the regulations. To effectuate this policy the Administrator has always had the power to adjust submitted maximum prices at any time. Upon inspection of the subsequent amendments it is evident that only a change in the form of statement has occurred and not a change in the Administrator's powers of adjustment."

726897—47——2

time the complaint was filed (R. 7a–17a). These sales were at prices in excess of those established by Order No. 112 to the extent of $49,192.34, three times which is $147,577.02.

Both parties appealed. The circuit court of appeals affirmed that portion of the judgment awarding damages of $1,257.15 and granting an injunction, and reversed and remanded the portion refusing to award damages based upon sales of styles 259, 259(b), and 467 (R. 43, 44). The circuit court reached its conclusion both by reference to the exclusive jurisdiction provisions of the Act and by a consideration of the issues on the merits.

DISCUSSION

I

In deciding the issues presented concerning Order No. 112, as amended, *infra*, pp. 30–33, the court below rested its decision on two grounds: (1) that the issuance of the retroactive provisions of the order constituted a valid exercise of the Price Administrator's power, and (2) that jurisdiction to determine the validity of the order was placed exclusively in the Emergency Court of Appeals by Section 204 (d) of the Emergency Price Control Act, *infra*, p. 23.

A. We believe the second phase of the decision of the court below is correct, since it can scarcely be contended that Order No. 112, as amended, is not one of the orders contemplated by Section 204

(d). That section plainly confers upon the Emergency Court of Appeals exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 of the Act and expressly deprives other federal courts and state courts of jurisdiction to consider the validity of such regulations and orders. The constitutionality of Section 204 (d) was considered and upheld by this Court in *Yakus* v. *United States,* 321 U. S. 414. See also, *Bowles* v. *Willingham,* 321 U. S. 503; *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410; and *Case* v. *Bowles,* 327 U. S. 92. It has likewise been specifically held that Section 204 (d) applies to attacks on the retroactivity of pricing orders in treble-damage actions. *Martini* v. *Porter,* 157 F. 2d 35 (C. C. A. 9), petition for certiorari filed December 23, 1946, No. 813; *Porter* v. *Eastern Sugar Associates,* C. C. A. 4, January 6, 1947 not yet reported. The issue involving the alleged invalidity of the retroactive provisions of Order No. 112, as amended, therefore, is one beyond the jurisdiction of the court below to determine, or of this Court to determine in this proceeding.[4]

[4] Following denial of petitioners' protest to the Administrator as to the validity of Order No. 112, they filed a complaint with the Emergency Court of Appeals which is presently pending, *sub nom. Senderowitz, et al.* v. *Fleming* (E. C. A. No. 377).

Petitioners attempt to avoid the effects of the exclusive jurisdiction provisions of Section 204 (d) by phrasing their objection to the validity of Order No. 112 in terms of the un-

B. The court below, however, did consider the validity of the order and upheld it. The court held that because the petitioners had failed to report their prices to the Price Administrator as required by Section 1499.3 (b) (1) of the General Maximum Price Regulation as amended by Amendment 54, *infra*, pp. 25–27, they were not in a position to complain that maximum prices for the goods which they had sold without complying with the regulation had not been fixed at the commencement of the suit, or that the order which retroactively fixed such prices was invalid (R. 40).

Although we are of the opinion that the court below had no jurisdiction to consider or pass upon the validity of Order No. 112, as amended, we think the reasoning which it employed with respect to the validity of the order is sound. Order No. 112, as amended, which is being applied in this civil case, is plainly not *ex post facto*, since only a law relating to a criminal prosecution is

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constitutionality of Section 205 (e) of the Act as applied to Order No. 112. But the seat of the alleged defect here (invalid retroactivity) is not the enforcement proceeding under Section 205 (e), but the price order itself. If the attack can always be translated into terms of the enforcement provisions of Section 205, Section 204 (d) will become meaningless and in every enforcement action the validity of the regulation or order involved will be open to question. As this Court has already warned, the right to attack the validity of the statute in an enforcement proceeding under the Act "may not be utilized as a means of indirectly attacking the regulations themselves instead of the statute" (*Case* v. *Bowles*, 327 U. S. 92, 98).

within the scope of the constitutional prohibition against laws of that character. *Calder* v. *Bull*, 3 Dall. 386; *Kentucky Union* v. *Kentucky*, 219 U. S. 140; *Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647. Nor does its retroactive force violate the due-process clause of the Fifth Amendment. *United States* v. *Heinszen & Co.*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226. Cf. *Graham & Foster* v. *Goodcell*, 282 U. S. 409; *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8. This Court has frequently remanded cases to the district courts so as to permit the issuance of administrative orders which would relate back and determine the liability involved in the original suit. *General American Tank Car Corp.* v. *El Dorado Terminal Corp.*, 308 U. S. 422; *Addison* v. *Holly Hill Fruit Products Corp.*, 322 U. S. 607; *Thompson* v. *Texas-Mexican Ry. Co.*, No. 42, October Term, 1945, decided April 29, 1946; *Smith* v. *Hoboken R. R., Warehouse & S. S. Connecting Co.*, No. 384, October Term, 1945.

Retroactive measures are not invalid *per se*, unless the effect of their operation is arbitrary or unreasonable. *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, (per Holmes, J.), approved in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 315–316. This is not a case in which the party adversely affected by the retroactive statute or order has relied to his detriment upon the pre-existing state of the law. Cf. *Chase Secu-*

rities Corp. v. *Donaldson, supra; Welch* v. *Henry,* 305 U. S. 134, 147; *Milliken* v. *United States,* 283 U. S. 15, 23. In the case at bar, the sales made by the petitioners were unlawful, since it was in violation of the Regulation to sell without filing, within ten days, reports which would permit administrative adjustment. Clearly it is not unreasonable or arbitrary to prevent a person from escaping liability because of his own unlawful conduct. *Stearns Co.* v. *United States,* 291 U. S. 54, 61–62.

The decision of the court below is in harmony with the holding of the Circuit Court of Appeals for the Ninth Circuit in the case of *Martini* v. *Porter,* 157 F. 2d 35, now pending on a petition for a writ of certiorari, *sub nom. Martini* v. *Fleming,* No. 813, this Term, and *Porter* v. *Kramer,* 156 F. 2d 687 (C. C. A. 8), wherein retroactive orders issued under similar maximum price regulations were determined to be valid.

II

The pronouncements of the court below with respect to the validity of Order No. 112, as amended, may be fairly said to be in conflict with the decision of the Emergency Court of Appeals in the case of *Collins et al.* v. *Fleming* (not yet reported—copies of the opinion are being lodged with the Clerk of this Court), Nos. 352, 353, and 357, Emergency Court of Appeals, decided January 2, 1947, in which the Administrator has re-

quested a rehearing, and in which, should the decision stand, the Government contemplates filing a petition for a writ of certiorari in this Court because of the conflict and the importance of the question.[5]

In the *Collins* case the complainants had sold certain warehouse receipts for whiskey without having previously applied, as required by the regulation, for an order prescribing a method for determining the applicable ceiling prices. Thereafter, a treble-damage action was instituted against the sellers in the United States District Court for the Western District of Kentucky, and

[5] Petitioners cite as being in conflict with the decision in the instant case, the cases of *Porter* v. *Block* and *Porter* v. *Sherwood Distilling Co.*, 156 F. 2d 264 (C. C. A. 4). These cases held merely that there was no jurisdiction under Section 205 (a) of the Act for the issuance of a mandatory injunction to require a seller to apply for a retroactive maximum price. On Petition for Rehearing or Clarification, the court stated that its decision was without prejudice to the Administrator's right to establish retroactive maximum prices even then and to seek permission from the district court to file a supplemental pleading taking into account such retroactive prices to bolster the treble-damage count of the Administrator's complaint. *Bowles* v. *Lake Lucerne Plaza, Inc.*, 148 F. 2d 967 (C. C. A. 5), certiorari denied, 326 U. S. 726, held that an order granting an upward adjustment in defendant's maximum rents was to be construed as applicable prospectively only. It may also be noted that the court held that any objection to the non-retroactivity of the adjustment could be raised only before the Emergency Court of Appeals.

The case of *Ambrosia Brewing Co.* v. *Bowles*, 147 F. 2d 550 (E. C. A.), likewise cited by petitioners, is plainly not in conflict with the decision in the case at bar.

the Price Administrator subsequently promulgated Order No. 45 retroactively establishing maximum prices applicable to the sales involved in the treble-damage action. The Emergency Court of Appeals held the order to be invalid on the ground that the basic regulation itself established in-line prices which could be translated by the district court into dollars and cents, and that since the Price Administrator had committed this issue to the district court when he instituted the treble-damage action, his retroactive order establishing prices for the sales involved in that action was no more than a liquidation of the damages claimed and was, therefore, an illegal attempt by him to determine a factual issue wholly within the jurisdiction of the district court.

The regulatory provisions applicable in the *Collins* case and the case at bar are indistinguishable. Those involved in the *Collins* case[6] pro-

[6] Section 1499.3 (c) of the General Maximum Price Regulation at the time of the sale involved in the *Collins* case read as follows: "(c) In the case of a sale at wholesale or retail of a commodity which cannot be priced under paragraph (a) of this section, the maximum price shall be a price determined by the seller after specific authorization from the Office of Price Administration or any duly authorized officer thereof. A seller who seeks an authorization to determine a maximum price under the provisions of this paragraph shall file with the regional office of the Office of Price Administration for the region in which his principal place of business is located an application setting forth (1) a description of the commodity or commodities for which a

vided that the maximum prices of all sellers subject to the particular provisions of the regulation should be in line with those otherwise established by the regulation and required that such sellers apply to the Administrator to have those maximum prices specified. In the instant case the court below was of the opinion that the provisions of the same regulation as amended were applicable. By the terms of that amendment (Appendix, *infra*, pp. 25–27) sellers who, like those involved in the *Collins* case, were unable to determine their maximum prices in accordance with other provisions of the regulations were allowed to compute their maximum prices in accordance with the formula set forth in Section 1499.3 (b) and required to report that price to the Administrator, and the Administrator reserved the power to adjust that maximum price if it was deemed necessary. In the *Collins* case the sellers did not apply as required and in the instant case the petitioners did not report as required. In each case, after

maximum price is sought; (2) a statement of the reasons why such commodity or commodities cannot be priced under Sec. 1499.2 or Sec. 1499.3 (a) of this General Maximum Price Regulation; and (3) any other facts which the seller wishes to submit in support of the application. The seller shall also submit such additional pertinent information as the regional office may require. Such authorization will be given in the form of an order prescribing a method of determining the maximum price."

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the Administrator had commenced a suit for damages under Section 205 (e) of the Act he issued an order specifying in dollars and cents the maximum prices applicable for the particular sales.

The Emergency Court of Appeals held in the *Collins* case that no such further administrative action was proper, the Third Circuit Court of Appeals in the instant case has expressed a contrary view.

We submit that the regulation both before and after the amendment properly contemplated that the Administrator would specify or have the opportunity to specify the dollars and cents maximum prices applicable to particular sellers, and that this task would not be left, as the Emergency Court of Appeals suggested, to those courts called upon to pass on suits brought under Section 205 (e) of the Act. In the case of such a regulation, when the seller has not taken the required steps to permit administrative action, the Administrator should have the power to specify prices even after the sale in order to prevent a seller from escaping damage suits by reason of his own wrong. The Administrator has not claimed, however, the right to issue such orders specifying maximum prices if the regulation standing alone provides a means of determining the specific applicable maximum price without need for steps which will permit further administrative action.

The regulation involved here is the General Maximum Price Regulation and similar provisions have been employed by the Price Administrator in other regulations of broad applicability. Orders similar to the one involved here have been issued in connection with several hundred damage suits brought under Section 205 (e) of the Act. Not only does the decision of the Emergency Court of Appeals on the issue of the validity of a retroactive order conflict with that of the court below but it also conflicts with decisions of the Eighth and Ninth Circuits in the *Kramer* and *Martini* cases, *supra,* respectively. Resolution of the conflict, therefore, is sufficiently important to warrant review of the question by this Court.

Because of the presence of the jurisdictional question in the case at bar, however, this case may not be an appropriate one in which to resolve the conflict between the decision in the *Collins* case

[1] The Emergency Court of Appeals was of the opinion that the regulation fell in this class, and seemingly thought that its construction of the regulation was in accordance with the Administrator's own interpretation. An examination of the Administrator's brief and the transcript of oral argument before the Emergency Court of Appeals however indicates that the court misunderstood the Administrator's true position. It is for this reason that the Administrator has filed a petition for a rehearing in the Emergency Court of Appeals in the *Collins* case instead of immediately petitioning for certiorari. It is to be noted that Judge Maris, who wrote the opinion in the *Collins* case, also concurred in the decision of the Third Circuit in the case at bar.

and the decision of the court below. For if this Court should determine that the lower court had no jurisdiction to pass upon the validity of the regulation in the present case, it would not reach the issue upon which there is a conflict. Nevertheless, if this Court is of the opinion that the present case is an appropriate vehicle for resolution of the conflict, we would not oppose the granting of the writs herein sought with respect to that question and the issue as to the exclusive jurisdiction of the Emergency Court of Appeals.

III

Petitioners assert that there was no evidence to show that the sales were made to wholesalers or retailers as distinguished from ultimate consumers. The evidence upon which the district court based its finding rests in large measure upon plaintiff's Exhibit 3, a 35-page transcript of sales invoices (identified at page 46 and introduced at page 55 of the Transcript of Testimony). This exhibit is not part of the Record here, nor was it before the circuit court of appeals. Therefore, petitioners cannot assert that the evidence did not support the finding; and the Administrator is entitled to rely on the finding of the court to prove his cause of action, without having to go behind it. At any rate, there is testimony in the Transcript showing that petitioners' sales ranged from 24 to 354½ dozen shorts to a cus-

tomer; also the names of the customers indicated that they were either firms or stores (Transcript of Testimony, pp. 54–55, 135–136; see R. 46). Clearly, this justified the court below in affirming the district court's finding that petitioners, who concededly were large-scale manufacturers, did not sell to individual consumers but to wholesalers and retailers who were purchasing for use in the course of trade or business.

As to the finding in respect to wilfulness in connection with the sales upon which the trial court granted judgment, it may be noted that the burden of proving the so-called "Chandler defense"* has been specifically placed upon the seller by the statute. At the conclusion of plaintiff's case, petitioners moved to dismiss, thus declining to introduce any evidence of their own to establish the Chandler defense; there was, therefore, no opportunity for the Administrator to rebut such evidence and to introduce evidence specifically showing wilfulness. Even were this not so, the evidence in the case at bar would have been sufficient to justify the court in its findings. Petitioners marketed and sold huge quantities of

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*The defense is that the overcharges were neither wilful nor the result of failure to take practical precautions to prevent their occurrence. (Section 205 (e) of the Act, as amended by the Stabilization Act of 1944, 58 Stat. 632). If this defense is proved, damages are limited to the amount of the overcharge.

three new styles of shorts manufactured from egregiously inferior and unserviceable materials without obeying the plain mandate of the regulation, requiring them to report their tentative maximum prices. They also charged more than the ceiling prices already established on several other styles. Their base period figures were wrong and had to be corrected. The trial court was clearly justified in finding (R. 21a), particularly in view of the petitioners' failure to offer any extenuation, that "Defendants' conduct was in complete disregard of the requirements of the General Maximum Price Regulations and the duties imposed upon them by law."

Furthermore, the concurrence of both courts below in the findings fortifies the conclusion that they were not erroneous and should justify this Court in being particularly hesitant to overturn them. See, *United States* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67; *Williams Manufacturing Co.* v. *Shoe Machine Corp.*, 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278.

CONCLUSION

The judgment of the court below is correct. However, if this Court considers this case a proper vehicle for resolution of the conflict of

decisions herein pointed out, we do not oppose the granting of the petition, except as to the issues discussed in Point III hereof. As to those issues the petition should be denied.

Respectfully submitted,

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Acting Solicitor General.
JOHN R. BENNEY,
Attorney.
WILLIAM E. REMY,
Deputy Commissioner for Enforcement,
DAVID LONDON,
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SAMUEL MERMIN,
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Office of Temporary Controls,
Office of Price Administration,
Washington 25, D. C.

JANUARY 1947.

APPENDIX

STATUTE AND REGULATION INVOLVED

1. *Emergency Price Control Act.*—The pertinent sections of the Emergency Price Control Act, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; 50 U. S. C. App., Supp. V, 901 et seq.), are as follows:

Section 2 (c). Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. * * *

Section 2 (g). Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

Section 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or

of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Section 201 (d). The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act.

Section 204 (d). * * * The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

Section 205 (e). If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from

the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful, nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is

instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b),[1] insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]

2. *General Maximum Price Regulation.*

Section 1499.1 (a)—(7 F. R. 3153).

Section 1499.1 *Prohibition against dealing in commodities or services above maximum prices.* On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity,* and no person shall sell or supply any *service,*

[1] This refers to Sec. 108 (b) of Stabilization Extension Act of 1944.

at a price higher than the maximum price permitted by this General Maximum Price Regulation; and * * *

* * * * * *

Section 1499.3 (b) (1), as amended by Amendment 54 (7 F. R. 3153; 8 F. R. 6962).

Section 1499.3. *Maximum prices for commodities and services which cannot be priced under § 1499.2.* The seller's maximum price for a commodity or service which cannot be priced under § 1499.2 of this General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices established by this General Maximum Price Regulation. Such price shall be determined by the seller in accordance with the following procedures: * * *

(b) In the case of a sale, other than at wholesale or retail, of a commodity for which a maximum price or pricing method has not been specifically authorized by the Office of Price Administration,

(1) The seller (i) shall select a comparable commodity for which a maximum price has been established under § 1499.2 (a) (1) of this regulation; (ii) shall divide his maximum price for the comparable commodity by its current direct cost; and (iii) multiply the percentage so obtained by the current direct cost of the commodity being priced. All customary discounts, trade practices, and practices relating to the payment of transportation charges in effect with respect to the sale of the comparable commodity shall apply to such maximum price.

"Comparable commodity" as used in this subparagraph (1) means a commodity which is made

by the same seller, has the same general use and is recognized in the trade or industry as being of the same general type, even though different materials or construction are used, and has a current direct cost varying by not more than 50% from the current direct cost of the commodity being priced. If more than one commodity can be regarded as comparable, the one whose current direct cost is closest to the current direct cost of the commodity being priced shall be regarded as the comparable commodity.

"Direct cost" means the sum of direct labor and direct material costs. Direct labor costs shall in no event be computed on wage rates higher than those permitted by law, and direct material costs shall in no event be computed on prices higher than the maximum prices established by the applicable maximum price regulations.

Within ten days after determining a maximum price under this subparagraph (1), the seller shall report such price to the appropriate field office of the Office of Price Administration upon a form, duly filled out, copied from the form contained in Appendix C of this regulation. The price so reported shall be subject to adjustment at any time by the Office of Price Administration.

Section 1499.3 (b) (1), as amended by Amendment 61 (7 F. R. 3153; 9 F. R. 5169).

Section 1499.3 *Maximum prices for commodities and services which cannot be priced under § 1499.2.* A seller's maximum price for a commodity or service which cannot be priced under

§ 1499.2 and for which a maximum price or pricing method has not been otherwise established by the Office of Price Administration shall be a maximum price in line with the level of maximum prices established by this regulation and shall be determined in the following manner: * * *

(b) In the case of a sale other than at wholesale or retail of a commodity:

(1) The seller shall (i) find the most comparable commodity for which he then has a maximum price under § 1499.2 (a) (1); (ii) divide this price by the current unit direct cost of such commodity; and (iii) multiply the percentage so obtained by his current unit direct cost for the commodity being priced. The resulting figure shall be his maximum price for the commodity. All customary allowances, discounts, or other price differentials and all practices relating to the payment of transportation charges in effect with respect to the most comparable commodity shall apply to the commodity being priced.

The "most comparable commodity" under this paragraph (b) (1) must meet all of the following tests:

(1) It must belong to the narrowest trade category which also includes the commodity being priced.

(2) It must have a current unit direct cost varying from that of the commodity being priced by not more than 25% of the latter cost.

(3) It must be currently produced by the seller or, if he is not currently producing a comparable commodity, it must have been produced by him within the twelve months preceding his use of this pricing method.

If more than one commodity meets all the above tests, the one whose current direct cost is nearest to the current unit direct cost of the commodity being priced shall be the "most comparable commodity."

"Current unit direct cost", as used above, means the sum of the amounts (not higher than permitted by law) which it costs the seller, or if he is not currently producing it, would cost him, for direct labor and materials to produce the commodity at the time he uses this pricing method.

The maximum price determined for the commodity under this paragraph (b) (1) shall, before such commodity is offered for sale, be reported by the seller to the District Office of the Office of Price Administration for the District in which his main office is located. The report shall be made in duplicate upon a form copied from Appendix C of this regulation. A maximum price so determined and reported may not be redetermined by the seller even though his costs increase.

Section 1499.3 (e) (1), as added by Amendment 61 (9 F. R. 5169).

(e) (1). The Price Administrator, or any Regional Administrator or any State or District Director so authorized by his Regional Administrator, may at any time approve, disapprove or revise maximum prices reported, proposed or established under paragraphs (a), (b) (1), or (c) of this section so as to bring them into line with the level of maximum prices otherwise established by this regulation.

3. *Order No. 112 under Section 1499.3 (e) (1) of the General Maximum Price Regulation.*

OFFICE OF PRICE ADMINISTRATION
350 Fifth Avenue
NEW YORK 1, N. Y., *October 20, 1944.*
File No. 2–13b 1–341.2–8

ROYAL MANUFACTURING CO.,
93 Worth Street,
New York, N. Y.

ORDER NO. 112 UNDER SECTION 1499.3 (e) (1) OF THE GENERAL MAXIMUM PRICE REGULATION

GENTLEMEN: This is in reference to your reports dated August 1, 1944, determining a maximum price under Section 1499.3 (b) (1) of the General Maximum Price Regulation for two styles of men's shorts.

It appears that you were in business during March, 1942; that you did not deliver or offer for delivery the same or any similar commodity during March, 1942; that insofar as you have been able to ascertain no closely competitive seller delivered or offered for delivery the same or similar commodity during March, 1942; that you did deliver or offer to deliver a "comparable" commodity during March, 1942 for which a price has been established under Section 1499.2 of the General Maximum Price Regulation.

Section 1499.3 of the General Maximum Price Regulation provides that the seller's maximum price for a commodity which cannot be priced under Section 1499.2 of the General Maximum Price Regulation shall be a maximum price in line with the level of maximum prices estab-

lished by the General Maximum Price Regulation. We have examined the cost figures and markup submitted by you and it is our opinion that the maximum price reported by you is not in line with the level of maximum prices established under the General Maximum Price Regulation and accordingly the maximum price reported by you should be revised.

After due consideration of the foregoing and under the authority vested in the Regional Administrator of Region II of the Office of Price Administration by Section 1499.3 (e) of the General Maximum Price Regulation, *it is Ordered:*

1. That your maximum selling price for your sales to wholesalers and retailers shall be established as follows:

Description:	*Style No.*	*Authorized maximum prices*
Men's Shorts made of 44 x 36 cotton printed cloth, 10 yards to the dozen, two buttons.	467	$1.60 per dozen. Terms: 1% ten days, Net 30 days.
Men's shorts made of 44 x 36 cotton printed cloth, 9 yards to the dozen, two buttons.	259	$1.50 per dozen. Terms: 1% ten days, Net 30 days.

2. Your maximum price shall be subject to the same allowances, discounts and price differentials to different classes of purchasers as those heretofore established by you.

3. You shall keep a copy of this order in your establishment together with your current records as required by Section 1499.12 of the General Maximum Price Regulation.

4. Except as provided in this order, the provisions of the General Maximum Price Regulation shall continue to govern sales of these commodities.

5. This order may be revoked, amended or adjusted at any time.

A copy of this order has been filed today with this office where it is open for inspection by the public.

This order shall become effective immediately.

(S) DANIEL P. WOOLLEY,
Regional Administrator.

4. Amendment No. 1 to Order No. 112 under Section 1499.3 (b) (1) of General Maximum Price Regulation.

OFFICE OF PRICE ADMINISTRATION
350 Fifth Avenue

NEW YORK 1, N. Y., *May 8, 1945.*

In reply refer to

File No. 2-13b1-341.2-8

ROYAL MANUFACTURING CO.,
93 Worth Street,
New York, N. Y.

AMENDMENT NO. 1 TO ORDER NO. 112 UNDER SECTION 1499.3 (B) (1) OF THE GENERAL MAXIMUM PRICE REGULATION

GENTLEMEN: Under date of October 20, 1944, the Regional Office of the Office of Price Administration issued the foregoing order which in-lined the prices for designated commodities reported by you under Section 1499.3 (b) (1) of the General Maximum Price Regulation. Although the order did not in specific terms state that the modified prices were your maximum prices from the date when you first offered the commodities for

sale down to the date of your report, viz., August 1, 1944, such was the intent and purport of the order. It is now considered desirable to give specific statement to that intent.

After due consideration of the foregoing, the Regional Administrator has determined as follows:

(a) The introductory words to the paragraph designated "1." in Order No. 112 under Section 1499.3 (b) (1) of the General Maximum Price Regulation are amended to read as follows:

1. That your maximum selling price for your sales to wholesalers and retailers, prior to August 1, 1944 and subsequent to October 20, 1944, have been and are as follows:

* * * * *

A copy of this amendment has been filed today with this office where it is open to inspection by the public.

This amendment shall become effective immediately.

Very truly yours,

(S) DANIEL P. WOOLLEY,
Regional Administrator.

STATEMENT OF CONSIDERATIONS ACCOMPANYING ORDER NO. 112

* * * We have carefully checked all available market sources of men's shorts and our surveys show that in March 1942 a 44 x 36 cloth was used only for bookbindings and was considered impractical and unserviceable for use in men's undershorts. We have also conferred with the merchandising division of J. C. Penny Co., Sears Roebuck Co. The Belk Stores and various other

Buying Offices who specialize in low end and other types of merchandise, and could find no merchandise offered or sold, made of a material with a thread count as low as 44 x 36 for these purposes. However, quantities of shorts were purchased on or about March 1942 made from material 60 x 48 at $1.80 per dozen which was the general prevailing market price.

In view of the above facts we are of definite opinion that the recommended price of $1.60 per dozen is a liberal price in line with the general level as contemplated under GMPR, and the price should be revised under Section 3 (e) of the GMPR.

* * * * *

We contacted Mr. Griffith of the Merchandising Division of J. C. Penny, to learn whether or not they purchased in March 1942 a short made of material 44/36 count. Mr. Griffith stated that the cheapest short on the market at that time was an 80/80 unshrunk which they retail at 29¢ and which cost them $2.00 per dozen. He further stated that if 44/36 were available, which he doubts, the retail price would have been from 14¢ to 19¢ although he did not know of any one who had offered for sale during that period a short made of material of this low count. Furthermore, he stated that J. C. Penny did not at any time carry a short made of as low a count as 44/36 because it is completely unserviceable.

We contacted Mr. Herman Hartman, president of Arkwright Inc. (Whether or not his organization ever purchased a short made from material 44/36.) He stated that to the best of his

knowledge a short of this count was never produced in March 1942 because it would be too inferior to offer for sale as it would give no service. He stated however, that he had purchased 80/60 unshrunk at $1.75 to $2.00 per dozen. Due to different sources of supply there is a variation of price.

U. S. GOVERNMENT PRINTING OFFICE: 1947